



IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 40, ARTICLES 40 (3), ARTICLE 47 (1), ARTICLES 64 (b),

ARTICLES 68 (a), 68 (c) (ii), ARTICLES 162 (2) (b) AND ARTICLES 165 (3) (b) AND (e)

AND

IN THE MATTER OF: REGISTRATION OF TITLES ACT CHAPTER 281 OF THE LAWS OF KENYA, SECTION 23

AND

IN THE MATTER OF: GOVERNMENT LANDS ACT CHAPTER 280 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: TRUST LANDS ACT CHAPTER 288 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: LAND ACQUISITION ACT CHAPTER 295 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE GAZETTE NOTICE NO. 6652

REPUBLIC.....APPLICANT

VERSUS

THE REGISTRAR OF TITLES, MOMBASA.....1ST RESPONDENT

**THE COMMISSIONER OF LANDS.....2ND
RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3RD
RESPONDENT**

**EMFIL LIMITED.....EX-PARTE
APPLICANT**

JUDGMENT

- (1) The Applicant seeks judicial review orders of certiorari, prohibition and mandamus with respect to Gazette Notice No.6652 of 14th June 2011 through which the 1st Respondent purported to revoke the Applicant's title to the suit properties being parcels of land created by sub-division of LR 12335/1 which it purchased from M/s Associated Sugar Company Ltd in 1987 and of which it was the registered proprietor.
- (2) By the said Gazette Notice No. 6652 of 2011, the 1st Respondent purported to revoke the Applicant's titles to the suit property among other parcels of land on the ground that it had since allocation and issue of titles to private developers in respect of the parcels of land come to the notice of the Government that the said parcels of land were reserved for public purposes and the allocations were therefore illegal and unconstitutional, and the government had in view of the public need and interest revoked the said titles.
- (3) The uncontroverted facts of the case are that the Applicant was at all material times before the revocation of title by Gazette Notice No. 6652 of 2011, the registered proprietor of 119 parcels of land the remainder of the 143 sub-divisions created out of parcel of land LR 12335/1 measuring 2824.9 hectares which it bought from M/s Associated Sugar Co. Ltd after the surrender of 5 plots to the government for public use, gifting 10 plots to the Chale Fishermen Group and the sale of 9 plots to various individuals, all which transactions were carried out with the necessary approvals/consents of the 2nd Respondent. It was also undisputed that following purported Government takeover and allocation of the parcels of land in 2006 to private individuals by the District Land Adjudication and Settlement, the Applicant successfully sued for invalidation of the allottees' ownership of the suit land in **Msa HCCC No. 181 of 2007, Emfil Ltd versus Hamisi Mwalimu Mwarandani & 8 Others** including the 2nd Respondent herein. It was alleged by Applicant without any rebuttal by the Respondents that following the revocation of titles by Gazette Notice No. 6652 of 2011, numerous private individuals were allocated parcels of land on the suit property and given their respective titles to the parcels. This latter action is the subject of pending application for contempt of court against the 1st and 2nd Respondents and the District Land Adjudication and Settlement Officer and the Director, Land Adjudication and Settlement.
- (4) The Respondents did not file any replying affidavits but their counsel, Mr. Oscar Eredi, Principal Litigation Counsel made elaborate written and oral submissions in response to the Applicant's counsel's – Mr. Ochieng Advocate - submissions. Each counsel cited various authorities in support of their respective clients' case and the court is indebted to them for their industry in the exposition of the legal principles applicable.
- (5) By a ruling dated 30th May 2012, this court ruled that a site visit was necessary to determine the position of background with respect to the development status of the suit property, the possession of the applicant, any encroachment by the squatters and settlement thereon by stakeholders who had purchased or been given plots by the Applicant as alleged. The court visited the suit property on the 23rd July 2012 and at the end of the visit invited the parties to make further submissions on the matter following the site visit and then reserved the Judgment in the proceedings. Both parties filed written submissions on the site visit.
- (6) On the whole, the Applicant's case in sum is that:

- (a) The Respondents' action in revoking the titles and allocating the land to squatters was an unconstitutional infringement of its right to property under Article 40(1) of the Constitution as the legal owner of the suit property as confirmed by the High Court decision in **HCCC 181 of 2007**, Mombasa and statutorily underpinned by section 23 of the Registered Titles Act Cap. 281 Laws of Kenya.
- (b) The Respondents' take over of the Applicant's suit properties amounted to taking of property without compensation contrary to Article 40(3) of the Constitution and therefore null and void.
- (c) The Respondents have no power to revoke or cancel a registered title to land, and therefore the decision contained in Gazette Notice No. 6652 of 2011 is null and void for being ultra vires.
- (d) The Respondents' decision to revoke the Applicants' title offended the Applicants' right to fair administrative action under Article 47 of the Constitution and the decision was unreasonable and the Applicant was not given a fair hearing before the decision was taken.
- (e) Public policy favoured the observance of the sanctity of titles to uphold the entire system of registration of titles and ownership of property necessary to ensure certainty in land transactions.
- (7) For the Respondents, the Principal State Counsel sought to introduce **"facts of the case"**, which had not been adduced by an affidavit in reply, through which the counsel alleged that the transfer of the suit property to the Applicants by the original owner Associated Sugar Company Ltd was irregular and fraudulent in that:

- (a) It was done without referral to the government's reversionary rights under the original lease-hold of 34 years from 1979 up to 2013 and in contravention of the original purpose of the allocation which was agricultural purposes to grow sugar cane by changing user to residential purposes; and
- (b) The transfer was fraudulent because the directors of Associated Sugar Ltd and Emfil Ltd were essentially one and the same and that it was undertaken just a few months before Associated Sugar Company went into liquidation.

On the basis of these **"facts"** counsel submitted that **"since the whole transaction was tainted with illegality and meant to defraud the public the whole transaction including the transfer of the suit property and the sub-division thereof was null and void ab initio. It could not confer any rights to the Applicants and hence the revocation was justified as it was meant to facilitate the inception of a settlement scheme for purposes of settling squatters. The government being the custodian of public interest was justified in revoking the title [and] it was purely within its power"** Counsel further argued that the constitutional protection of the right to property is not absolute and it does not extend to land which is found to be irregularly acquired and the court had a duty to uphold public interest which in this case involved the need to settle squatters as **"the suit property had not been developed as intended since 1979 [which] led to an influx of squatters aggravated by the Applicants themselves who were holding the land for speculative purposes. The purpose of the acquisition was to facilitate settlement of squatters, ... a public interest which overrides the Applicants' individual interest."**

Counsel sought to distinguish the decision in **HCCC 181 of 2007** as one of which between the Applicants' title and the 9 Defendants' titles was genuine while the issue in this suit, according to counsel, is about a determination as to whether the revocation was justified, which he submitted in the affirmative **"as the [revocation] was meant to facilitate the inception of a settlement scheme for purposes of settling squatters."**

- (8) Although the Respondents' counsel's submissions on the **"facts of the case"** were technically not evidence and I could not rely on these as a rebuttal of the Applicants' sworn affidavit evidence, I held, in my ruling of 30th May 2012, that I could take it into account as raising an issue of the possession of the suit property and occupation of squatters which may have direct bearing on the issue in dispute in view of the discretionary nature of the judicial review remedies. Accordingly, pursuant to the Article 159 principle of substantial justice without regard to technicalities on procedure, I directed a court visit to the

suit property as described above.

(9) Except for the differences in the interpretation and emphasis to be placed on the features on the ground at the suit property, the counsel for the parties agree that there were bush clearings, construction of perimeter walls and temporary and permanent housing under construction. On my part, I noted electricity power line freshly connected along the main access road to the suit property along which numerous bush clearings and frontal walling was under construction. There was also a large crowd led by the area Member of Parliament which claimed to own plots on the suit property which they said was part of their ancestral land, including some alleged Kaya shrines. Apart from these works by third parties, the only physical development on the land was the 4 km access road inside the suit property which the Applicant claimed to have constructed - and allegation which was denied by the locals as having been done by the Chale Island Resort Operators. Some building materials in the form of sand were being delivered on the site as we visited. The size of the plots on the suit property ranged from an estimated ¼ acre where a temporary wooden structure frame was constructed and a reportedly 10-acre Asilia Beach which appeared to be a business plot.

(10) In my view, although various constitutional and legal principles have been canvassed both in support and defence of the application herein, the issues for determination in the judicial review proceedings are three-fold:

- (a) Whether the Registrar or the Government has power to revoke titles to land;
- (b) Whether the Government can be justified by public interest to revoke title to private land; and
- (c) Whether the judicial review orders of certiorari, prohibition and mandamus are, in discretion, available in the circumstances of this case.

(11) Whether the Registrar of Titles or the Government has power to revoke title to land and whether the same can be justified in public interest.

Counsel for the Respondents submitted that the decision to revoke the titles was taken in public interest and summed up the Respondents' contention as follows:

“The decision taken by the Respondents to revoke the Ex parte Applicant’s title was not outrageous and does not defy logic. Rather it is the alienation of and the sub-division of the suit property by the Ex parte Applicant that is outrageous and defies logic. Any sensible person who applies his mind to the question of the illegal alienation would certainly revoke the illegal title herein considering that the suit property was set aside for agricultural development and allied purposes of the Associated Sugar Company for a period of 36 years. The directors of the sugar factory while fully aware that it was in financial doldrums and would be liquidated audaciously transferred the suit property to themselves vide an entity known as Emfil Ltd” the Applicant here. That decision was taken by public spirited government officials for the common good.”

Counsel then cited case authorities for the proposition that public interest overrides private individual's interest, including **Kenya National Examination Council v. R exp. Kemunto Regina Ouru Nairobi Civil Appeal No. 127 of 2009; Kenya Power & Lighting Co. v. NMG Co. Ltd & 2 Others Nairobi Civil Application No. 74 of 2010; Mohamed Tariq Khan v. Land Registrar, Lamu, Malindi HC Misc. Appl. No. 27 of 2010; Milankumar Shah & 2 Others v. City Council of Nairobi & Another, HCCC No. 24 of 2005 (O.S) and Mureithi & 2 Others v. AG & 4 Others Nairobi HCCC No. 158 of 2005.**

Counsel also urged the court not to aid in the perpetration of illegality allegedly committed by the Ex parte Applicant herein and cited the decisions of **National Bank Ltd v. Wilson Ndolo Ayah, Court of Appeal Nairobi Civil Appeal No. 119 of 2002; Republic v. Commissioner of Lands Ex parte Somken Petroleum Co. Ltd Nairobi HC Misc Appl. No. 807 of 2004.** Counsel did not specifically address the issue of the Registrar's power to revoke title to land.

(12) Counsel for the Applicant contended that the Registrar had no power to cancel or revoke titles and that the action was unconstitutional infringement of the Applicant's right to property and against public interest and policy to protect the sanctity of titles. Several case authorities were cited including **Nairobi Permanent Market Society & 11 Others v. Salimia Enterprises & 2 Others, Civil appeal No. 185 of 1997; Ocean View Plaza Ltd v. AG (2002) 2 KLR 277; Kenya Breweries Ltd v. Municipal Council of Mombasa Misc. Appli. 244 of 2001 (2009) eKLR; R v. Kisumu District Lands Officer & Another Misc. Appl. No. 80 of 2008 (2010) eKLR; Nairobi Pet. No. 178 of 2011, Power Technics Ltd v. AG & 2 Others; and my own decision in Msa HC JR No. 24 of 2011, Republic v. Registrar of Titles ex parte Bernard Atati.**

Counsel also argued that the Respondents' action in revoking the titles without giving the Applicant an opportunity to show cause against the purported revocation was contrary to the constitutional protection of right to fair administration action under Article 47 of the Constitution and in breach of Wednesbury unreasonableness principles and the Applicants' legitimate expectation as expounded in **Council of Civil Service Union v. Minister for Civil Service (1985) A.C. 374** among other cases authorities.

(13) I have considered the respective submissions by counsel on the main issue of the Registrar's power to revoke title to land and the justification of public interest and I have to find that there is unanimity among the courts that the Registrar has no authority in law to revoke or cancel titles to land, whether in public interest or otherwise. It is the courts which must order the revocation of titles or refuse to uphold the private individual's title to land in case of public interest or where the Applicant has committed fraud or other illegalities with regard to the title as happened in the several case authorities cited by the Respondents. To hold otherwise would lead to the usurpation of the judicial mandate of the courts by the Executive in contravention of the constitutional doctrine of Separation of Powers. In the **ex parte Bernard Atati** case, I considered a Gazette Notice which is in similar terms as the Gazette Notice No. 6652 of 2010 herein and said:

“Under the Registered Titles Act, the Registrar has only power to rectify titles where there are wrongful or fraudulent entries under section 60 or where directed by the court under section 64 of the Act or to correct clerical errors in certificates of title, register or entries therein or to cancel spent entries. The Registrar has no power to revoke or cancel the title itself. Should there be a successful challenge to a registered proprietor's title under section 23 of the Act, it would be the court to certify the rectification of title to effect the cancellation of the registered proprietor's title on the ground of the fraud or misrepresentation, pursuant to section 64 of the Act.

“The Gazette Notice No. 15570 attempts to justify the Government's decision by a declaration that as the parcels of land which had been allocated to private developers “were reserved for public purposes under the relevant provisions of the Constitution, the Government Lands Act (Cap. 280) and the Trust Land Act (Cap. 288) the allocations were therefore illegal and unconstitutional”. Such a declaration is the constitutional province of the courts and to use it to justify the otherwise unauthorised revocation of titles is an unconstitutional infringement of the doctrine of separation of powers by the lands department of the executive government. While the government may take that constitutional view of things, it is only the court that can make authoritative and binding decisions on constitutional interpretation and therefore the Executive cannot be excused from the unconstitutionality of its action by its partisan interpretation of undisclosed constitutional provisions.

“Even if the Government sought to reset the situation to the pre-alienation position before the parcels of land were in the words to the Gazette Notice “allocated and titles issued to private developers” it was obliged by the constitutional provisions on protection of private property under Article 40 of the Constitution to pay full compensation and subject to the owners right of access to court under Article 40 (3) (b) (ii) of the Constitution of Kenya. The transaction to revoke the allocations cannot have been done by an unilateral declaration by a Gazette Notice.”

For these reasons, I find that the government cannot **revoke title to land** even for **“public need and interest”** or for alleged illegality. The Government is obliged to move the court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will

not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the court in an appropriate case in making an order for cancellation of title or in authorizing subject to due compensation the compulsory acquisition or takeover of private property.

(14) Should the discretionary judicial review remedies of Certiorari, Mandamus and Prohibition issue as prayed by the Ex parte Applicant?

When made aware that there were squatters on the suit property who had been granted title documents by the Government under a settlement scheme undertaken by the Director of Land Adjudication and Settlement, I made a decision to visit the site to establish the position on the ground. I reasoned that the judicial review remedies are discretionary and their grant or refusal depends on the circumstances of the case including the possession of occupation of land and development thereon. See ruling of 30th May 2012 herein and Wade & Forsyth, Administrative Law, 9th Ed. (2004) at pp. 700-3, where the learned authors explained the position as follows:

“The freedom with which the court can use its discretion to mould its remedies to suit special situations is shown by two decisions already encountered. One was the case where the House of Lords refused mandamus to a police probationer wrongly induced to resign, although he made out a good case for that remedy, in order not to usurp the powers of the Chief Constable, and instead granted him an unusual form of declaration to the effect that he was entitled to the remedies of unlawful removal except for reinstatement [Chief Constable of North Wales Police v. Evans (1982) 1 WLR 1155]. The other was the case of the Takeover Panel, where in fact no relief was granted but the Court of Appeal explained the novel way in which remedies should be employed in future cases, with the emphasis on declaration rather than certiorari and on ‘historic rather than contemporaneous’ relief [R v. Panel on Takeovers and Mergers ex parte Datafin (1987) Q.B. 815]

The Government, through the State Counsel’s submissions, maintains that the land has been utilized for the settlement of squatters in the region and urges the court to uphold its settlement scheme in public interest, to solve the problem of landlessness in the area. The Applicant complained that one of the land parcels on the site had a palatial construction which could not have been put up by squatters. Relying on my own observation, I recall that there were bush clearings of as small as ¼ acre plot and permanent construction on reportedly 10-acre piece. I have also noted the numerous title deeds attached to the Applicant’s application for contempt against the government officers dated 4th July 2012. The allocations of land are for approximately 1 hectare at the **“outright purchase”** price of about Kshs.7,000/= which clearly indicates that the scheme is intended for the poor landless of the region. It may be that one or more of the squatters have been persuaded to sell their portions to their richer counterparts or some rich **“squatter”** has escaped the sieving exercise which must accompany the identification of genuine landless but this fact cannot be the basis for disqualifying the whole settlement scheme as one not meant for squatters or poor landless.

(15) There is grave concern that some of the acts in furtherance of the allocation and issuance of title deeds were done after the Ex Parte Applicant’s suit and in breach of an order for stay granted upon leave to file for judicial review. This matter is however the subject of a pending application for contempt of court against the Respondents and other named government officials whose hearing was deferred to await the Judgment in this proceeding. Disobedience of court orders must be dealt with firmly and appropriately punished when proved.

(16) In my view the settlement of the over 180 families in the scheme known as Ramisi Kinondo Squatter Settlement Scheme (as shown in the documents attached to Applicant’s application for contempt of court dated 4th July 2012) would in public interest override the single Applicant’s interest to the suit property. As I have said above, the contempt of court must be dealt with firmly when proved at the pending hearing. **However, there are third party interests acquired by the squatters who have been allocated and who have paid for those plots and titles issued to them. Such squatters cannot be required to determine before accepting the offer by the Government whether the Government has the right to allocate the land to them. In the usual and ordinary order of things, the Government has custody and right to allocate all public land and the squatters would have a legitimate**

expectation that any land allocated to them by the Government is done with lawful authority.

Moreover, the private law principle of **nemo dat quod non habet** (see Brown's Legal Maxims, (1939) 10th at p. 546) is only a general principle that where goods are sold by a person who is not the owner and who does not sell under the authority of the owner or with the consent of the owner, the buyer acquires no better title to the goods than the seller and it has important exceptions including sale by apparent owner of the goods and usage of the market and the buyer acquires good title if he buys in market overt, in good faith and without notice of defect or want of title of the part of the seller.

By analogy, the squatters here acquired a good title to the parcels of land which have been offered by the Government of the Republic of Kenya as the apparent owner of plots and for which they have paid the 'outright purchase' price in good faith in usual course of sale of land by Government without knowledge that the Government had no right to sell the parcels of land in view of the order of stay granted by the court.

(17) In the circumstances, I am not able to grant the judicial review orders of certiorari, mandamus and prohibition even though the Applicant has demonstrated that the Gazette Notice 6652 of 2011 was made without authority and in breach of the right to fair administrative action under Article 47 of the Constitution. I would authorize the Government, in view of the public interest in the settlement of squatters in the area of the suit property, to proceed with the proposed settlement scheme subject to strict enforcement of criteria for determination of squatter status by the adjudicating committee and subject further to a general limitation on resellability of the parcels of land to avoid land speculation. For this purpose, the Respondents will within 30 days lodge with the court for approval profiles of the allottees to demonstrate their squatter status and needs.

(18) What happens to the Applicant's title in view of the refusal of the judicial review orders?

I would have ordered the valuation/assessment and payment of due compensation for the suit property on the basis of compulsory acquisition of the property had I been convinced of the validity of Applicant's title to the property. I have noted the decision of the High Court in **Msa. HCCC 181 of 2007, Emfil Ltd versus Hamisi Mwalimu Mwarandani & 8 Others**. I have also noted submissions by the Principal State Counsel as to the illegality of the Applicant's title on the grounds of alleged fraudulent transfer from the original allottee Associated Sugar Company Ltd and irregular change of user and extension of lease from 34 years to a term of 99 years. Although these submissions are not supported by affidavit evidence as the Respondents did not file any replying affidavits, I find the allegations serious enough to warrant an investigation into the matter by further hearing. I note that the said allegations, though not made under the solemnity of an oath, are made by a senior Government officer and officer of the court who would not trifle with the court. It must be for this type of situations that the Constitution under Article 159 provides for substantial justice without regard to technicalities of procedure to require a further hearing and determination of the issue of the validity or otherwise of the Applicant's title to the property as a prerequisite to the determination of payment of due compensation by the Government for the take over of the suit property.

I consider that the right to access to court under Article 40(3)(b)(ii) of the Constitution in situations of compulsory acquisition of property contemplates such a hearing. Although the proceedings before the court are for judicial review, the allegations of infringement of the constitutional right to property under Article 40 brought the application into the purview of Article 22 of the Constitution. In accordance with long established practice of deeming an application brought under judicial review to be an application under the Bill of Rights to enable the court a wide latitude of the choice of remedies (see **Githunguri v. AG No. 2 (1986) KLR 1**), I will treat this application as an application for enforcement of the Bill of Rights with respect to the right to access to the court in cases of compulsory acquisition or take-over of private land, and direct that the issues of the Applicant's title to the suit property and the payment of compensation under Article 40 of the Constitution be determined hereinafter on the basis of the pleadings filed by the Applicant and affidavit evidence to be filed by the Respondent within the next 14 days from the date of this Ruling.

(19) Accordingly for the reasons given in the foregoing paragraphs, I make the following orders:

(1) The Applicant's Notice of Motion dated 9th August 2011 is dismissed.

(2) Subject to the vetting of squatters to determine eligibility and to a bar on resale of the parcels of land for a period of not less than 20 years, the Respondents are at liberty to proceed with the allocation of the suit property to genuine squatters or landless persons of the area. The Respondent will file in court for approval the profiles of all squatter allottees to the suit property within 30 days from the date of this ruling.

(3) The judicial proceedings herein are deemed to be an application under the Bill of Rights for the enforcement of the Right to property under Article 40 of the Constitution.

(4) The Respondents will file affidavits evidence in reply and such other pleadings as they may be advised on the question of the validity of the Applicant's title to the suit property.

(5) The Applicant's right to compensation for the takeover of the suit property by the Government will be determined upon establishment of the Applicant's valid title.

(5) The pending application for contempt of court against the 1st and 2nd Respondents and two others shall proceed alongside the further hearing of this matter in relation to the Applicant's title on such dates to be fixed by the court in consultation with the parties.

(6) The matter will be mentioned on 8th October 2012 for directions as to further hearing.

(7) Costs in the cause.

EDWARD M. MURIITHI
JUDGE

Dated and delivered this 7th day of September 2012.

R.M. MWONGO
JUDGE

In the presence of:

Nyabidia holding brief for Ochieng for the Applicant

Mr. Eedi for the Respondents
Mwadime - Court Clerk